MOTION FILED

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No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.

Petitioner,

v.

LYNN W. BAZZLE and BURT A. BAZZLE, in a representative capacity on behalf of a class and for all others similarly situated; DANIEL B. LACKEY, GEORGE BUGGS, and FLORINE BUGGS, in a representative capacity on behalf of a class and for all others similarly situated,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Date: February 24, 2003

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Petitioner has consented to the filing of this brief; its letter of consent has been lodged with the Clerk of the Court. WLF has been unable to obtain the consent of counsel for Respondents, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and participates in administrative proceedings in a variety of areas, WLF devotes substantial resources to promoting civil justice reform and freedom of contract. To that end, WLF has appeared before this Court as well as other federal and State courts in cases touching upon the enforceability and interpretation of arbitration agreements. *See, e.g., PacifiCare Health Systems, Inc. v. Book*, No. 02-215 (dec. pending). WLF has consistently supported the rights of private parties to enter into binding agreements to arbitrate any disputes arising between them, as a quicker and more efficient alternative to litigation.

WLF has also appeared regularly in cases addressing the proper scope of class action litigation. *See, e.g., Dow Chemical Co. v. Stephenson,* No. 02-271 (dec. pending); *Matsushita Electric Industrial Co. v. Epstein,* 516 U.S. 367 (1996); *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000). WLF has repeatedly expressed its concern over the proliferation of class action lawsuits being filed in federal and state courts and the inhibiting effect that such suits can have on the development and expansion of businesses.

WLF is concerned that the decision of the South Carolina Supreme Court, if allowed to stand, will undermine the effectiveness of arbitration as an efficient alternative to litigation, by wedging into the arbitration process all of the detailed procedures inherent in class action litigation. That result is particularly problematic when, as here, there is no indication that the parties ever consented to the adoption of class action procedures when they entered into an arbitration agreement. WLF is concerned that if the decision below stands, parties will be more reluctant to enter into arbitration agreements because they will justifiably fear that some court will later construe the agreements as consent to being subjected to class-based arbitration, which generally lacks the procedural protections afforded by courts in class action litigation.

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no direct interest in the outcome of this case. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective distinct from that of any party.

For the foregoing reasons, WLF respectfully requests that the Court allow it to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the Brief for Petitioner.

In brief, Petitioner Green Tree Financial Corp. ("Green Tree") is challenging under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, two interrelated class action awards. Those two awards require Green Tree to pay nearly $27 million in statutory damages, attorney fees, and costs to two classes consisting of more than 3,700 individuals. One of the arbitration proceedings was initiated by Petitioners Lynn and Burt Bazzle (the "Bazzle arbitration"). The other proceeding was initiated by Daniel B. Lackey and George and Florine Buggs (the "Lackey arbitration"). Although the arbitration agreements entered into between Green Tree and those individuals are "silent" on the subject of class-based arbitrations, the South Carolina courts directed the arbitrations to proceed as class actions. Green Tree contends that South Carolina's decision to subject them to class-based arbitration is inconsistent with, and therefore is preempted by, the FAA.

The Bazzle Arbitration. In 1995, the Bazzles entered into a retail installment contract and security agreement with

Green Tree to finance home improvements. The agreement included an arbitration clause which provided, *inter alia,* that all disputes "arising from this contract" were to be resolved by an arbitration proceeding governed by the FAA.

The Bazzles later claimed that Green Tree, when it entered into the loan agreement, violated the attorney and insurance-agent notice preference provisions of South Carolina law. *See* S.C. Code Ann. §§ 37-10-102(a), -105. Their suit in South Carolina state court was later certified as a class action (over Green Tree's objections both that certification was unwarranted and that any action by the court should be stayed pending arbitration) on behalf of other South Carolinian who had entered into home improvement loan agreements with Green Tree. The court then ordered that the class action proceed before an arbitrator appointed by the court. On July 24, 2000, the arbitrator ruled in favor of a plaintiff class of 1,899 individuals. Pet. App. 55a-81a. The arbitrator found that Green Tree had violated South Carolina law in connection with the loan agreements entered into with each class member. Although the plaintiffs did not attempt to show that they had suffered any damages as a result of the violations, the arbitrator imposed a class-wide penalty of between $5,000 and $7,500 per transaction -- for a total award of $10,935,000. *Id.*. 69a-71a. He also awarded the plaintiffs $3,645,500 in attorney fees. *Id.* 71a-81a. On September 15, 2000, the South Carolina Court of Common Pleas confirmed the award. *Id.* 27a-35a.

The Lackey Arbitration. Daniel Lackey and his fellow class members entered into consumer installment contracts and security agreements with Green Tree for the purchase of manufactured homes. The agreements contained arbitration

clauses that were essentially identical to the arbitration clause at issue in the Bazzle arbitration.

Daniel Lackey and George and Florine Boggs in 1996 filed a putative class action against Green Tree in South Carolina state court, alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. In 1998, the South Carolina Court of Appeals ordered (over the plaintiffs' objection) that the arbitration clause be enforced. Thereafter, the individual who was already presiding over the Bazzle arbitration was appointed as arbitrator. He later granted the plaintiffs' motion to certify the arbitration as a class action on behalf of South Carolinians who had entered into manufactured home loans with Green Tree, agreeing with the plaintiffs that certification was warranted for the reasons expressed by the trial court in the Bazzle proceedings.

On July 24, 2000 (the same day he ruled in the Bazzle arbitration), the arbitrator ruled in favor of a plaintiff class of 1,840 individuals. *Id.* 82a-109a. Although the plaintiffs did not attempt to show that they had suffered any damages as a result of the violations of South Carolina law, the arbitrator imposed a class-wide penalty of $5,000 per transaction -- for a total award of $9,200,000. *Id.* at 96a-98a. He also awarded the plaintiffs $3,084,918 in attorney fees and costs. *Id.* 98a-106a. On December 19, 2000, the South Carolina Court of Common Pleas confirmed the award. *Id.* 36a-54a.

Green Tree appealed both actions, which eventually were consolidated in the South Carolina Supreme Court. On August 26, 2002, that court affirmed both awards, rejecting Green Tree's contention that the arbitrations should not have been permitted to proceed on a class-wide basis. *Id.* 1a-26a.

Initially, the court examined the arbitration clauses and determined that they were "silent" regarding class-wide arbitration. *Id.* 19a. The court stated that the language relied on by Green Tree was ambiguous and "should, therefore, be construed against the drafting party, Green Tree." *Id.* Although acknowledging that (as specified by the parties) the arbitrations were governed by the FAA, *id.* 11a, the court distinguished several federal cases -- which held that class-wide arbitration is impermissible unless explicitly agreed to by the parties -- on the ground that those cases were based on § 4 of the FAA, which the court held inapplicable to state-court proceedings. *Id.* 19a-20a.

The court went on to identify an "independent state ground" for affirmance: as a matter of South Carolina law, *trial courts* have "discretion" to permit class-wide arbitration when the arbitration clause is silent regarding that issue. *Id.* 20a. The court held that granting such discretion was consistent with South Carolina's policy of "strongly favor[ing] arbitration" and that class-wide arbitration may be ordered "when the arbitration agreement is silent if it would serve efficiency and equity and would not result in prejudice." *Id.* 21a-22a. The court worried that if such discretion were not granted, "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law." *Id.* 22a. The court also held that arbitral decisions are subject to limited review; the court upheld the arbitral awards in the absence of evidence that they were issued "in manifest disregard of the law" -- a level of error that could only be reached by showing that "the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit,

and clearly applicable to the case." *Id.* 24a (emphasis in original).

SUMMARY OF ARGUMENT

Under well-established due process and FAA principles, absent class members are not bound by judgments entered in arbitration proceedings that proceed on a class-wide basis. By their very nature, arbitrations are informal proceedings in which it is virtually impossible to gauge the adequacy of the class representative's representation of absent class members. The inability of reviewing courts to ensure adequate representation throughout the proceedings – combined with the fact that the arbitration process is premised on the voluntary participation of all parties – precludes any effort to bind absent class members.

Accordingly, there can be no justification for interpreting an arbitration provision as permitting class-wide arbitration, in the absence of a clause *explicitly* authorizing such arbitration. Interpreting arbitration provisions in this manner in the absence of explicit authorization greatly complicates arbitration proceedings, thereby depriving parties of the simple, informal, and quick procedure promised them under the FAA when they agreed to arbitrate their disputes. Yet, because absent class members cannot be bound by such class-wide arbitration, there are no corresponding benefits to offset those costs.

The great danger from the decision below is that it will discourage parties from agreeing to arbitrate future cases. In light of the decision below, contracting parties could well conclude that no amount of disclaimers can insulate them from a judicial finding that they are subject to class-wide

arbitration. If so, they are unlikely to agree to arbitrate future disputes, a result inimical to the purposes served by the FAA. Because the decision below "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" as expressed by the FAA, it is preempted by the FAA.

ARGUMENT

I. CLASS ACTIONS ARE UNWORKABLE IN THE ARBITRATION CONTEXT BECAUSE ABSENT CLASS MEMBERS COULD NOT BE BOUND BY AN ARBITRATION AWARD WITH WHICH THEY WERE DISSATISFIED

Consideration of whether class-wide arbitration is consistent with the FAA must begin with an examination of the practicability of class-wide arbitration as a means of resolving large numbers of disputes involving common questions of law or fact. Unless class-wide arbitration can predictably resolve disputes, there can be no justification for complicating arbitration proceedings (by, as here for example, increasing the number of claims more than a thousand fold, from three to 3,700) and thereby depriving parties of the "simplicity, informality, and expedition" promised them under the FAA when they agreed to arbitrate their disputes. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 21, 30 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The clear answer is that class-wide arbitration *cannot* resolve disputes within any degree of finality. That is because, under well established due process principles, absent class members cannot be bound by arbitrations conducted as

were these arbitrations, and as arbitrations are commonly conducted elsewhere. In the absence of the ability to bind absent class members, no rational party to a contract would ever agree to class-wide arbitration of contract disputes.

It is "'a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* at 762 (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449 at 417 (1981)). A judgment or decree among parties to a lawsuit resolves issues as among them, "but it does not conclude the rights of strangers to those proceedings." *Id.*

Class action litigation represents one very limited exception to that broad principle. Under limited circumstances a nonparty to a lawsuit may be bound by a judgment when a similarly situated individual who *is* a party purports to act on behalf of the nonparty and adequately represents the nonparty throughout the proceedings. *Id.* at 762 n.2; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985). This class-action exception to the general rule "was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder." *Id.* at 808. The Court has permitted absent class members to be bound by class action judgments in the limited circumstances described above both because of the practical necessity of a judicial device that allows for the efficient adjudication of massive

numbers of similar claims and because the litigation process allows the issue of adequate representation to be closely monitored -- both by the trial judge and by judges hearing appeals from a class action judgment. *Id.* at 808-812.

None of those justifications for the class-action exception are applicable to class-based arbitrations. The entire arbitration process is based on the concept of consent. This Court has recognized that "the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt Information Sciences v. Bd. of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). Thus, an individual who has been included in a certified class in a class-based arbitration cannot be compelled to adjudicate his claims in the arbitral forum -- even if he has been notified of the arbitration and has failed to exercise a right to opt out. Every party to a contract has a due process right to seek redress under that contract in a court of law (and, in many instances, to have his claims tried before a jury); in adopting the FAA, Congress made clear that that right will not be extinguished in the absence of an explicit agreement by a contracting party to submit his claims to arbitration. And even if a party has agreed to arbitration, he has the right to insist on arbitration pursuant to the terms of his own arbitration clause (*e.g.*, the right to a say in choosing the arbitrator) and not to be forced to participate in someone else's arbitration.

Nor can binding nonparties to arbitration awards be justified as a practical necessity; *i.e.*, as the only practicable means of adjudicating massive numbers of similar claims. Both federal and state courts permit binding class actions to proceed in appropriate circumstances, and thus there is no pressing need to create a parallel system of class-based

arbitrations. On rare occasions, it may be that similarly situated individuals who have signed arbitration clauses cannot effectively vindicate their rights through individual arbitrations but could do so if allowed to press their claims collectively. Under those circumstances, the FAA's solution is to deem the arbitration clauses unenforceable (thereby freeing the individuals to pursue class action litigation in a court), not to permit class-based arbitration. *See, e.g., Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 229-30 (1987). *See also Shutts,* 472 U.S. at 809 (class-action exception justified in part because judicial class actions "may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.").

Moreover, the careful monitoring of adequacy of representation that *Shutts* deemed so critical to the class-action exception simply is not possible in the context of arbitration. For example, rarely is a transcript maintained of an arbitration proceeding, thus making it virtually impossible for a reviewing court to determine whether the class representative and her counsel adequately represented the interests of absent class members throughout the arbitration proceedings. Indeed, in making his decision an arbitrator is generally not required to provide any findings of fact or conclusions of law; so a class-based arbitration award may well state nothing regarding the arbitrator's findings as to adequacy of representation.

In sum, absent class members cannot be bound by awards issued after arbitrations conducted as were these arbitrations, and as arbitrations are commonly conducted elsewhere. In the absence of binding judgments, class-based arbitrations are wholly unworkable and deprive parties of the

efficiencies that caused them to agree to arbitration in the first instance.

As the Court recognized in *Shutts,* "Whether it wins or loses, [a class action defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [the class action defendant] is bound." *Shutts,* 472 U.S. at 805. For example, even though Green Tree lost in this case, it would at least like assurances that absent class plaintiffs are barred from seeking additional damages beyond the $5,000 to $7,500 in statutory damages awarded to each of the class members. But as the preceding discussion indicates, Green Tree can have no such assurances; an absent class member who claims to have suffered damages in excess of the amount awarded is likely to assert that he cannot be bound by the award from an arbitration proceeding to which he never consented and in which the adequacy of representation could not be closely monitored.

Some courts that have permitted class-based arbitrations have sought to alleviate the problems cited above by increasing court supervision of the arbitration process whenever a class-based proceeding is certified. *See, e.g., Keating v. Superior Court,* 645 P.2d 1192, 1209 (Cal. 1982) (court "would have to make initial determinations regarding certification and notice to the class, and . . . exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation"). Such measures do not, of course, address the fact that absent class members have not affirmatively consented to the arbitration. More importantly, such measures add significantly to the complexity of the arbitration process, thereby depriving parties of the simple and expeditious

proceedings that, as the FAA recognizes, parties bargain for when entering into arbitration agreements.[1]

II. WHILE PARTIES ARE FREE TO AGREE TO CLASS-BASED ARBITRATION, IT IS UNREASONABLE EVER TO ASSUME THEY HAVE DONE SO GIVEN THE ONE-WAY NATURE OF CLASS-BASED ARBITRATION AWARDS

It is the policy of the FAA to enforce the agreements of contracting parties with respect to arbitration of disputes. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) ("[T]he central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'") (quoting *Volt*, 489 U.S. at 479); *id.* at 57 ("[P]arties are generally free to structure their arbitration agreements as they see fit."). Thus, parties to a contract are free, if they so desire, to specify the use of class-based arbitration proceedings to resolve any contract disputes.

But it is highly unlikely that parties would ever intend that their disputes should be arbitrated on a class-wide basis. Because, as demonstrated above, absent class members would not be bound by any judgment, parties to arbitration realize that they have nothing to gain and much to lose from class-based arbitration. Any effort to discern the intended meaning of an arbitration clause must begin with a recognition of the distaste with which the contracting parties are likely to view class-based arbitration.

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[1] The extreme complexity of the Bazzle and Lackey arbitrations is well illustrated by the size of the attorney fees awarded by the arbitrator -- a total of more than $6.7 million.

At no point in its analysis did the South Carolina Supreme Court register any recognition of the one-sided nature of the class-based arbitration it was imposing on Green Tree. Instead, the court reached its determination that class-based arbitration was permitted under the arbitration clause by purporting to employ rules of statutory construction based on South Carolina law.

First, the court determined that the arbitration clause was "silent" regarding class-wide arbitration. Pet. App. 19a.[2] The court concluded that that silence created an "ambiguity" regarding the availability of class-wide arbitration, and that the ambiguity should be construed against Green Tree as the drafting party. *Id.* That conclusion is far from clear, even as a matter of South Carolina law. As this Court explained in *Mastrobuono*: "[T]he common-law rule of contract interpretation that a court should construe ambiguities against the interest of the party that drafted it . . . [is intended] to protect the party who did not choose the language from an unintended or unfair result." *Mastrobuono*, 514 U.S. at 63-64. The Court applied the common-law rule in that case because it deemed it unlikely that stock brokerage customers would have had "any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right" to sue for punitive damages. *Id.* at 64. In contrast, it cannot be seriously contended that the common-

[2] That conclusion is highly questionable. The arbitration clauses provide for arbitration of "[a]ll disputes, claims, or controversies arising from or relating to this contract, or the relationships which result from this contract." *Id.* 110a. If parties specify that they agree to arbitrate disputes arising from a particular contract, it is logical to conclude that they have *not* agreed to arbitrate disputes arising from another contract.

law rule needs to be applied in this case in order to protect Green Tree's customers "from an unintended or unfair result." Given that the parties are unlikely to have intended (had they written a clause directly addressing the issue) to permit class-based arbitration that could bind the parties but would not bind absent class members, a ruling that no class-based arbitration is permitted can hardly be deemed "an unintended or unfair result."

The real danger here is that by imposing class-based arbitration procedures in the face of a "silent" arbitration clause, the South Carolina courts are discouraging parties from agreeing to arbitration in future cases. In light of the decision below, contracting parties could well conclude that no amount of language (of the "disputes . . . arising from or relating to *this* contract" variety deemed ambiguous here) will insulate them from a judicial finding that they are subject to class-wide arbitration. If so, they are unlikely to agree to arbitrate future disputes.

But any state policy that significantly discourages arbitration of disputes is contrary to the federal policy embodied in the FAA. In interpreting arbitration clauses, "'due regard must be given to the federal policy favoring arbitration.'" *Mastrobuono*, 514 U.S. at 63 (quoting *Volt*, 489 U.S. at 476). Because the decision below "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" as expressed by the FAA, it is preempted by the FAA. *Hines v. Davidovitz*, 312 U.S. 52, 67 (1941).

Respondents insist that "'[t]here is no federal policy favoring arbitration under a certain set of procedural rules'" and thus that "States are . . . free to determine whether,

under state law, arbitrations may proceed on a class-wide basis." Brief in Opposition to Certiorari Petition at 14 (quoting *Volt,* 489 U.S. at 476). Respondents' citation to *Volt* is inapposite. In that case, the parties had expressly agreed to the applicability of the California arbitration rule at issue. In contrast, the parties in this case specified, as the South Carolina Supreme Court acknowledged, that "Green Tree's arbitration clause is governed by the FAA." Pet. App. 11a n.9. Moreover, the Court determined that the California arbitration rule at issue in *Volt* was one "manifestly designed to encourage resort to the arbitral process." *Volt,* 489 U.S. at 476. The same cannot be said regarding the decision below, which is likely to discourage parties from including arbitration clauses in future contracts.

In light of the federal policy of encouraging arbitration of contract disputes, the only reasonable interpretation of the arbitration clause at issue in this case is that the parties did not intend to permit class-wide arbitration of claims. Directing arbitration to proceed on the basis of individual claims will not deprive individual claimants of an effective remedy against Green Tree. The award of from $5,000 to $7,500 for individual claims, in addition to the award of hefty attorney fees, makes it well worth the while of an individual claimant to pursue her claims against Green Tree.[3]

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[3] As noted previously, in those cases in which potential recoveries are too small to make arbitration of individual claims an effective means of vindicating substantive rights, courts should be directed to declare the arbitration provision unenforceable and permit the parties to seek judicial remedies, rather than to permit class-wide arbitration. *Shearson/American Express*, 482 U.S. at 229-30.

III. THE DECISION TO ALLOW CLASS-WIDE ARBITRATION WAS MADE BY THE COURTS, NOT THE ARBITRATOR, AND THUS IS NOT ENTITLED TO ANY SPECIAL DEFERENCE

In their opposition to the petition for certiorari, Respondents insisted that the decision to impose class-wide arbitration was made by the arbitrator, not the South Carolina state courts. Opp. Br. 25-28. Respondents argue that the Court should defer to the arbitrator's decision in this regard because "by agreeing to submit the construction of their contract to an arbitrator, the parties bargained for the procedures he devised." *Id.* 26.

Respondents' arguments can be squared with neither the decision of the South Carolina Supreme Court nor the orders of the trial courts. The South Carolina Court of Common Pleas in the Bazzle proceeding unambiguously directed the arbitration to proceed on a class-wide basis. Pet. App. 3a-4a. In his subsequent decision, the arbitrator gave no hint that he felt at liberty to reverse that decision. *Id.*- 82a-109a.

The impetus for class-wide arbitration in the Lackey proceeding is less clear. On the one hand, unlike in the Bazzle proceeding, the trial court never entered an order requiring class-wide arbitration. On the other hand, the arbitrator in the Lackey proceeding was the same arbitrator as in the Bazzle proceeding, the Lackey Respondents argued that the reasoning of the district court order in the Bazzle proceeding also required class-wide arbitration of the Lackey proceeding, and the arbitrator accepted that argument.

But whatever doubt there may have been about the source of class-wide arbitration in the Lackey proceeding was

erased by the decision of the South Carolina Supreme Court. At no point in its decision did the court indicate that its affirmance of class-wide arbitration was based on a decision to grant deference to an arbitrators' reasonable interpretation of a arbitration clause. Rather, the court engaged in its own *de novo* analysis of the Green Tree arbitration clause. *Id.* 19a.[4] The court held, alternatively, that the class-wide arbitration could be affirmed based on *trial courts'* "discretion" to permit class-wide arbitration when the arbitration clause is silent on the issue. *Id.* 20a. The court held that trial courts should exercise that discretion based on whether class-wide arbitration "would serve efficiency and equity and would not result in prejudice." *Id.* 21a-22a. By so holding, the South Carolina Supreme Court made clear its view that the availability of class-wide arbitration was an issue for the courts to decide. Thus, contrary to Respondents' argument, the decision to permit class-wide arbitration cannot be defended as one based on the

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[4] The court distinguished several federal decisions -- which held that class-wide arbitration is impermissible unless explicitly agreed to by the parties -- on the ground that those cases were based on § 4 of the FAA, which the court held inapplicable to state-court proceedings. *Id.* 19a-20a. The federal decisions cannot be distinguished on that basis; they were not based solely on an interpretation of § 4. While the applicability of FAA § 4 to state court proceedings is an open question, it is settled law that FAA § 2 is applicable in both federal and state courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). Section 2 provides that arbitration agreements covered by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As noted above, the South Carolina Supreme Court's interpretation of the Green Tree arbitration clause in a manner that will actively discourage use of arbitration agreements violates both Section 2 and the pro-arbitration policy underlying the FAA.

arbitrator's reasonable interpretation of an ambiguous contract provision.

Respondents' argument does, however, serve to point out another basic flaw in the South Carolina Supreme Court's analysis. The question whether a dispute is subject to arbitration at all -- the "question of arbitrability" -- "is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 591 (2002) (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)). But the Court has made clear that the phrase "question of arbitrability" has a rather limited scope, and once that question has been answered in the affirmative, it is up to the arbitrator to decide procedural questions, regardless how important those procedural questions may be in the ultimate disposition of the arbitration. *Id.* at 592. The issue whether the parties intended to permit arbitration on a class-wide basis would seem to be the type of procedural issue that *Howsam* assigns to the arbitrator for initial determination. Thus, the South Carolina Supreme Court erred in assigning that issue to the courts for decision, and in upholding the court of common pleas's discretionary decision that class-wide arbitration was appropriate. Accordingly, at the very least the Court should reverse the judgment below, with directions that the arbitrators hearing these proceedings on remand should decide the class-wide arbitrability issue without regard to any of the orders issued to date by the South Carolina courts.

But because the issues raised by this case are highly important and likely to recur frequently, WLF respectfully suggests that the Court use this opportunity to express its views on the propriety of class-wide arbitration orders in the

face of arbitration agreements that are "silent" on the issue. For all the foregoing reasons, WLF respectfully requests that the Court hold that orders directing class-wide arbitration -- in the absence of a provision in the arbitration clause *expressly* authorizing such arbitration -- stand as an obstacle to the accomplishment and execution of Congress's purposes in adopting the FAA and are therefore preempted.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the decision of the South Carolina Supreme Court be reversed.

Respectfully submitted,

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